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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 43954-9-II

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

Paul Salvage, et ux, *Appellant*

v.

Geiger Pharmacy, et al., *Respondent*.

REPLY BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

I.	ARGUMENT OF APPELLANT IN REPLY	4
A.	The trial court abused its discretion by refusing to grant a short continuance of the summary judgment motion.	4
1.	Salvage clearly requested a continuance.	4
2.	There was no prejudice to Geiger in granting Salvage a short continuance for the reasons set forth in <i>Coggle</i> and progeny.	5
3.	Salvage's request for a continuance to secure counsel is significant because <i>pro se</i> parties are generally held to the same standard as attorneys.	7
4.	The trial court did not rule on Geiger's motion to dismiss.	8
B.	Expert testimony is not required to demonstrate a triable issue of fact on whether a pharmacist breached his duty of care where the pharmacist dispensed an incorrect amount of the drug prescribed to the customer/patient.	9
1.	Geiger's speculation as to why a double dose of methadone may have been appropriate precludes its argument that summary judgment was proper.	9
II.	CONCLUSION	10

TABLE OF AUTHORITIES

Table of Cases

<i>Batten v. Abrams</i> , 28 Wn. App. 737, review denied, 95 Wn.2d 1033 (1981)	7
<i>Butler v. Joy</i> , 116 Wn. App. 291 (2003)	4
<i>Coggle v. Snow</i> , 56 Wn. App. 499 (1990)	5, 6, 8

I. ARGUMENT OF APPELLANT IN REPLY

A. The trial court abused its discretion by refusing to grant a short continuance of the summary judgment motion.

1. *Salvage clearly requested a continuance.*

Geiger argues that “Salvage explicitly stated on the record that he was not requesting a continuance regarding the motion for summary judgment.” Br. of Resp. at 20. This assertion ignores the fact that Salvage made at least two (2) requests for a continuance of the hearing after making this statement. *See* RP at 20, 25. Indeed, even before Salvage made this statement there was discussion on the record concerning a continuance of the summary judgment argument, at RP 5:

JUDGE LAURIE: Okay. Then we’re going to go forward today and, as I said, the first thing we’re going to address is the plaintiff’s motion for continuance. And, Mr. Salvage, is there anything else that you want to address in terms of that request for a continuance.

MR. SALVAGE: Your Honor, I brought interrogatories for Bob Geiger and the gentleman at my side, so ...

JUDGE LAURIE: Mr. Miller. So are you still requesting a continuance of today’s summary judgment argument or not?

MR. SALVAGE: Yes, I am.

As case law teaches, denials of requests for additional time which do not “fit within the guidelines of a CR 56(f) continuance” have been held to be an abuse of discretion. *Butler v. Joy*, 116 Wn. App. 291, 299-300 (2003) (“It is hard to see ‘how justice is served by a draconian

application of time limitations' when a party is hobbled by legal representation that has had no time to prepare a response to a motion that cuts off any decision on the true merits of a case.'").

Here, notwithstanding his one ill-advised statement to the contrary, Salvage clearly indicated his request for a brief 2-week continuance of the summary judgment hearing multiple times on the record and in multiple formats (i.e. orally and in writing.) This Court should review Salvage's assignment of error on the merits and decline Geiger's invitation—repeated throughout this proceeding—to summarily dismiss Salvage's claims on technicalities.

2. There was no prejudice to Geiger in granting Salvage a short continuance for the reasons set forth in Coggle and progeny.

Geiger attempts to argue prejudice as a basis supporting denial of Salvage's motion to continue the summary judgment proceeding. See generally Br. of Resp. at 22, 25.

Ironically, the reasons outlined by Geiger (chiefly, delay) as a valid basis for denial of a continuance were actually cited by the court in *Coggle* as reasons supporting the plaintiff's request for a continuance, to wit:

The case had been filed two years earlier. Little discovery had been pursued. The process would have been speeded by the court after a short continuance and the consideration of *Coggle's*

materials in response to the motion for summary judgment. Snow has not argued that he would have suffered prejudice if the court had granted a continuance, nor do we perceive any prejudice. We cannot discern a tenable ground or reason for the trial court's decision. We hold that the trial court improperly exercised its discretion in denying the motion for continuance.

See Coggle, 56 Wn. App. at 507-08 (emphasis added, citations omitted).

That is, given the age of the case, justice would have been better served by granting a short continuance to the plaintiff in order to consider whatever materials it wished to present at the summary judgment hearing. The same principle applies in this case: the process "would have been speeded" if the trial court would have simply granted the requested 2-week continuance. Geiger cites the general axiom "Justice delayed is justice denied." However, Geiger does not account for its own delay with respect to the proceedings. Indeed, Geiger did not even file an answer in the case. "The primary consideration in the trial court's decision on the motion for a continuance should have been justice." *Coggle*, 56 Wn. App. at 508. "We fail to see how justice is served by draconian application of time limitations here." *See id.*

Here, given the age of the case (i.e. over 2 years old with minimal activity) and the fact that little discovery had been accomplished up to that point (see CP at 102), Geiger would not have been prejudiced by a short 2-week continuance of the summary judgment hearing.

3. *Salvage's request for a continuance to secure counsel is significant because pro se parties are generally held to the same standard as attorneys.*

Geiger argues that Salvage, as *pro se* litigant is generally held to the same standard as an attorney. *See* Br. of Resp. at 22, n. 10 (citing *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, *review denied*, 95 Wn.2d 1033 (1981)). That a *pro se* litigant is held to the standard of an attorney this is all the more reason why the trial court should have granted a short 2-week continuance of the summary judgment hearing to allow Salvage to confer with attorney John Andrews to whom Salvage had already paid over \$2,000.00. *See* RP at 25. If nothing else, Mr. Andrews—or another attorney—could have assisted Salvage with putting the “discovery material” related to the prescription bottles and medical records into declaration form and presenting it to the trial court for consideration during the summary judgment motion. *See* Br. of Respondent at 18 (“Salvage confuses turning over discovery and presenting competent and admissible evidence at a summary judgment motion.”).

Counsel for Geiger may be technically correct in his assertion that “there was no evidence before the trial court on the summary judgment issue.” *See id.* However, this technicality should not preclude justice from being done in this case. At a minimum, Salvage, acting *pro se*,

should have been afforded his requested 2-week continuance of the summary judgment motion to have his chosen counsel represent him. *See, e.g., Coggle*, 56 Wn. App. at 508 (“The client, Coggle, after obtaining new counsel, should not be penalized for the apparently dilatory conduct of his first attorney.”).

4. *The trial court did not rule on Geiger’s motion to dismiss.*

Geiger brief is littered with references to Salvage’s alleged “history of noncompliance with court orders, failure to follow court rules, misrepresentations to counsel and the court, and overall dilatory tactics and prosecuting his case.” Br. of Resp. at 29.

It is important to note that the trial court did not rule on Geiger’s “Motion to Dismiss For Failure to Comply with Discovery Order.” This Court should decline Geiger’s implicit invitation to uphold dismissal of Salvage’s claim on a basis which was not decided. On remand, if they wish, the defendants can re-note their motion to dismiss. Until then, however, these argumentative assertions have no bearing upon an appeal of a denial of a motion to continue a summary judgment hearing. This Court should disregard them on appeal.

B. Expert testimony is not required to demonstrate a triable issue of fact on whether a pharmacist breached his duty of care where the pharmacist dispensed an incorrect amount of the drug prescribed to the customer/patient.

1. *Geiger's speculation as to why a double dose of methadone may have been appropriate precludes its argument that summary judgment was proper.*

Geiger argues that “[t]here is nothing in the record to substantiate that a prescription for an amount over what was allegedly prescribed was improper. In fact, prescriptions are often filled with amounts over what is prescribed with instructions to cut a pill in half, etc.” *See* Br. of Resp. at 27. Again, the first part of Geiger’s brief ignores Mr. Miller’s own declaration submitted to the court in support of Defendants’ Motion to Dismiss For Failure to Comply with Discovery Order, to wit:

10. On August 8, 2012, I received a fax that contained two pages of documents: one page of a chart note from Dr. Kramp dated 5/1/07 and a printout of prescription from Geiger Pharmacy from the year 2007.

11. On August 10, 2012, Mr. Salvage allowed me to inspect the two supposed prescription bottles in question as well as provided me seventeen (17) pages of chart notes from Dr. Kramp and printouts from Geiger Pharmacy. Mr. Salvage also told me that he was ready to note this case for trial.

CP at 141.

Secondly, Geiger’s argument that “prescriptions are often filled with amounts over what is prescribed with instructions to cut a pill in half,

etc.” necessitates a trial on this issue. Is this Geiger’s defense¹, *e.g.*, that Salvage was given double doses of Methadone with instructions to cut the pill in half? Was Salvage, the patient, informed of these instructions?

These types of questions are classic questions which require a jury. They are not, however, questions which expert testimony on the standard of care. That is, the question of whether it is a violation of the standard care to dispense pills in an amount doubling what the patient was prescribed is separate and apart from the question of whether the patient was advised to cut the pills in half in accordance with his or her prescription. In any event, even if this Court concludes that expert testimony was required to show violation of the standard of care, it can make this aspect part of the necessary proof in this case on remand.

II. CONCLUSION

For all the foregoing reasons and the reasons set forth in his opening brief, Salvage respectfully requests that this Court reverse the trial court’s decision granting Geiger’s motion for summary judgment. Justice was clearly not served in this case.

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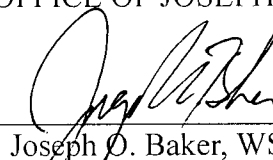
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¹ Recall that Geiger did not answer Salvage’s complaint.

Dated this 8th day of April, 2013.

LAW OFFICE OF JOSEPH O. BAKER

By

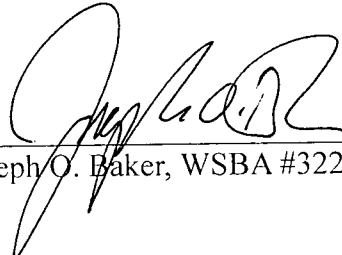


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
CERTIFICATE

I certify that on April 8, 2013 I caused a copy of the foregoing
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